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Life With the USA PATRIOT Act:

At the Crossroads of Privacy and Protection

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Six weeks after the attacks on the World Trade Center and the Pentagon, President Bush signed the USA PATRIOT Act into law. This sweeping law, purportedly aimed at fighting terrorism, amends more than 15 different statutes. The provisions of the USA PATRIOT Act address topics from increasing border patrols to processing visas to limiting money laundering. Some of these amendments are uncontroversial additions to the law; others, such as the various ways the Act extends the long arms of the law, are more notorious.

The increased surveillance powers are forcing librarians to come to a new understanding of the relationship between privacy rights and patron information. The new laws make it easier for authorities to follow the path of individuals up to and through the library doors. And into library computers. And library networks. And library sign-up sheets. And, well, any records the library keeps on its patrons. Because of the serious privacy implications, librarians face the task of maintaining and upholding traditional intellectual freedom principles in a severely changed legal climate.

The Uncertainty Principle

Since the first of this year, law enforcement authorities seeking information on 46 different patrons have approached 24 libraries in Oregon. Maybe.

Actually, no one knows. Or at least, those who do aren't telling. The far-reaching business records provision of the USA PATRIOT Act has been treated with a modified "no tell, don't tell" policy: The FBI refuses to share, and the act itself contains a built-in gag order keeping librarians from reporting that an order for production of patron records has taken place (50 USCA 1861(d), 1990 & Supp. 2002). The Justice Department insists these statistics are classified and refuses to release them to Congress in the open (Bryant, September 22, 2002). In fact, to

date it remains unclear whether the Justice Department has provided the information to Congress in any form.

The American Library Association's (ALA) Freedom to Read Foundation and civil liberties groups recently filed suit seeking release of the number of times the federal government has sought records from libraries, bookstores or Internet service providers under the USA PATRIOT Act (Madigan, 2002). The data may be secret, but one fact is quite clear: searches under the USA PATRIOT Act have been taking place in libraries. A survey of U.S. libraries estimated that approximately 200 libraries had been contacted by law enforcement for patron information in the three months following passage of the Act (Estabrook, 2001; Poynder, 2002).

The lack of hard numbers contributes to a climate of uncertainty and possibly even fear in libraries. It is difficult to imagine how release of USA PATRIOT Act statistical information could have an impact on national security. It is, unfortunately, not difficult to imagine the effect that abuse of government surveillance powers can have on public discourse.

Chilling Effects on Cognitive Liberty

In a chilling public service announcement aired this past summer, a young man approaches a librarian with a request for books. The librarian announces the books are no longer unavailable and asks the patron's name. When the patron turns to leave, two men in suits stop him. The Ad Council created this ad as part of their "Campaign for Freedom" aimed at highlighting the dangers outside forces present to our freedoms. This spot struck a chord with a library community copin'g with the dangers presented by the expanded access provisions of the USA PATRIOT Act (ALA, 2002, *American Library*). It concisely illustrates the fear that when "they" know what "you" are reading, self-censorship is sure to ensue.





Today, we take an essential
step in defeating terrorism,
while protecting the
constitutional rights of all
Americans.

—PRESIDENT BUSH
Remarks at signing of
USA PATRIOT Act of 2001
(October 26, 2002)

Free speech, free thought, and free association are privacy's *raison d'être*. Our freedoms, our civil liberties, are perhaps most at risk when citizens are too fearful to exercise them. Thus, libraries can only promote intellectual freedom when they act as impartial information resources, not when fear of intimidation or retaliation is present. After all, there is no need to ban a book when readers will be too fearful to pick it up. In effect, the First Amendment is circumvented by "threatening readers rather than prohibiting what they read" (Gelsey, 2002).

"In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others" (ALA, 2002, *Privacy*). It does not necessarily take an actual violation of patron privacy, such as that illustrated in the Ad Council spot, to chill "cognitive liberty" (Gelsey).

Courts have made it quite clear that freedom of speech includes the right to receive information and ideas. "It makes no difference that one can voice whatever view one wishes to express if others are not free to listen to these thoughts" (*Tattered Cover v. City of Thornton*, 2002). An environment of fear and uncertainty is one of chilled speech, and one that compromises the First Amendment. The effort to force the Department of Justice to publicly account for its library surveillance is one way to remove such uncertainty. Another is for librarians to better understand the reach of the USA PATRIOT Act's surveillance provisions and, with that knowledge, plan for patron privacy. The threat to cognitive liberty is lowered when libraries avoid creating unnecessary files of personally identifiable information and when our patrons are made aware of the privacy strengths and weaknesses of libraries.

A New Take on "Search the Library"

Libraries may experience a dramatic increase in law enforcement visits because of the ways search, seizure, and surveillance powers were enhanced by the USA PATRIOT Act. The expanded categories of material available under certain types of orders, the creation of nationwide search warrants and orders, and the lower thresholds the government must reach to receive a court order add up to easier law enforcement access to library information.

It is this last element, the lowering of the standards the government must meet to compel production of information, where the USA PATRIOT Act most expanded potential law enforcement access to library records, data, and infrastructure. Understanding the legal standards required to compel disclosure of information is the key to making sense of search and seizure law. These standards, created by statute and by courts interpreting the Fourth Amendment, can be placed along a continuum, from the lowest threshold to the highest:

1. *No legal process*. The government can acquire the information without process or order. Available when emergency, consent or exigent circumstances, among others, are present.
2. *Subpoena*. Signed by prosecutor (grand jury subpoena) or by agent (administrative); standard is relevance to investigation. Libraries can often move to quash in court.
3. *Relevance court order*. Court order required. Government can obtain the order merely by certifying to the court that the information likely to be obtained is relevant to a law enforcement investigation.
4. *Articulable facts court order*. Court order required. Government can obtain the order by offering specific and



articulable facts establishing reasonable grounds to believe the information to be obtained is both relevant and material to an ongoing investigation.

5. *Probable cause search warrant.* Search warrant required. Government can obtain the warrant by offering facts establishing a likelihood that a crime has occurred and that evidence of the crime exists in the location to be searched.
6. *"Super" search warrant.* Special search warrant required. Extra threshold requirements added (e.g., exhaustion of all other means of obtaining the evidence, requiring special authorization, etc.).
7. *The government may not acquire the information under any legal process.* The law may forbid the government from acquiring the information through any legal process.
(Adapted from Kerr, in press)

For most patron information the probable cause threshold has stood as a high standard, effectively keeping government intrusion in libraries, and the concomitant effect on cognitive liberty, at a low level. However, low thresholds for certain limited types of searches did exist before the USA PATRIOT Act. For example, transaction and account records for e-mail services have only required the lower specific and articulable facts standard (18 USCA 2703(c)(1), 2000 & Supp. 2002). Another example, administrative subpoenas, have often been served on libraries, typically requiring merely an affirmation of relevance to an investigation. These, however, are often successfully fought by libraries as unreasonably broad or for intruding on the free speech rights of the search subject.

The USA PATRIOT Act's most startling amendment to the surveillance laws,

section 215, extends the types of records available to the FBI while significantly lowering the threshold standard an agent must demonstrate to gain a court order. The title of this section belies its importance: "Access to certain business records for foreign intelligence and international terrorism investigations" (18 USCA 1861–1862, 2000 & Supp. 2002). This law was formerly limited to the collection of business records in very limited situations and required a showing of specific and articulable facts that the person the records pertained to was an agent of a foreign power. "Agents of a foreign power" referred generally to intelligence officers or members of an international terrorist association (Dempsey, 2002).

In one fell swoop, section 215 changed that by expanding the scope of access while lowering the threshold required for a court order. First, section 215 expands the scope of government access to records by authorizing the government to seize "any tangible things (including books, records, papers, documents, and other items)" which can include floppy disks, data tapes, computers with hard drives, and any library records stored in any medium (50 USC 1861(a)(1), 1991 & supp. 2002). Thus circulation records, Internet use records, registration information, and even "saved searches" and other customization tools are now within this section's reach (ALA, 2002, *The USA Patriot*).

Second, the USA PATRIOT Act lowers the standards required for a court order by eliminating the "agent of a foreign power" limitation. Now the search need only relate to investigations against international terrorism or clandestine intelligence activities. This effectively drops the threshold for an order to a very low legal standard, apparently requiring only that the agent believe the records sought are related to



We should turn our
energies to preventing the
reality of terrorism and
not be deterred by the
bugbear of privacy.

—ANONYMOUS

Assistant Director of a
Massachusetts public library
(Poynder, 2002)





The USA PATRIOT Act is treason pure and simple

—KAREN SCHNEIDER
(2002)

such investigations. One concern is that the broad language of the statute will allow fishing expeditions in library records: it is not clear at all that an application for a court order under section 215 need name an individual. Of final concern are the secrecy provisions: no one can disclose that the FBI has sought or obtained information under this section, no notice is required to be given to the person under investigation, and the court order itself shall not disclose the purposes of the investigation (50 USCA 1861(c)(2), 1861(d), 1990 & Supp. 2002).

How then can section 215 pass First and Fourth Amendment scrutiny? It may not, though not for lack of trying. The section provides a modicum of protection for free speech rights, allowing for court orders on investigations of “United States persons” provided that they are not “conducted solely upon the basis of activities protected by the First Amendment” (50 USCA 1861(a)(1), 1861(a)(2)(B), 1990 & Supp. 2002). This may not be enough to pass constitutional muster as the “solely” requirement would seem to leave plenty of room for investigations based primarily on protected activities. Those secrecy provisions may likewise be constitutionally suspect (American Civil Liberties Union, 2002).

The Fourth Amendment may provide even less protection because section 215 amends the Foreign Intelligence Surveillance Act (FISA). “Foreign agents” have no Fourth Amendment protections, and courts have acknowledged that the executive branch has broad discretion in national security matters. Thus, the FISA was designed to maintain a balance between national security and privacy through the foreign agents provision and through the use of “minimization procedures” for searches involving U.S. citizens (Evans, 2002). The USA PATRIOT Act may have gone too far in tipping the

balance to security. Sharing that belief is the ACLU, which is seeking a librarian willing to defy the gag order and challenge the act (Piore, 2002).

Responsibility for protecting citizens’ rights under FISA lies with the “secret” Foreign Intelligence Surveillance Court (FISC), which reviews applications under the Act. In May, 2002, for the first time since its founding in 1978, the secret federal court balked at a Justice Department request, publicly admonishing the department for breaking down the wall between domestic law enforcement and foreign intelligence gathering. The court rejected the Department’s interpretation of the USA PATRIOT Act, which allowed law enforcement to piggyback on the broad, low-threshold section 215 provisions without having to show probable cause. The Department of Justice has appealed the decision.

Two other provisions of the USA PATRIOT Act directly affect libraries. “Pen registers” and “trap and trace devices” are terms derived from the “good-old days” of surveillance. Pen registers tracked outgoing phone numbers; trap and trace devices tracked incoming phone numbers. Now, after the USA PATRIOT Act, Pen/Trap orders refer to the real-time interception of non-content electronic information. Non-content information such as e-mail headers, IP addresses, URLs, and routing and addressing information for Internet traffic can be intercepted under a Pen/Trap order (ALA, 2002, *The USA Patriot*).

Because Pen/Trap orders capture real-time transaction records, not content information, investigators need only certify that the information sought is “relevant to an ongoing criminal investigation” (18 USCA 3122(a)(1), 3122(a)(2), 2000 & Supp. 2002). Courts do not require probable cause because such content is treated like the writing on the outside of an envelope. Viewable in the open, the writer can have no reasonable expectation of privacy. The content inside the envelope, the letter, does have protection



under the Fourth, as does e-mail content.

Libraries are far more likely to come into contact with Pen/Trap orders than in the past because the USA PATRIOT Act allows for nationwide execution of these orders. If a suspect's path takes them into the library for, say, e-mail communication, an existing Pen/Trap order could be used to place a device on the computer or network to intercept the non-content information. Many public libraries may have Pen/Trap surveillance in place and not be aware of it. Often the actual interception of electronic information takes place at the Internet service provider, whether municipal or private. These providers are ordered to keep silent by the nondisclosure provision of section 216 (18 USCA 3123(d), 2000 & Supp. 2002).

The USA PATRIOT Act has also extended the availability of wiretaps which, unlike Pen/Trap orders, do intercept electronic communication content. Criminal investigation wiretap orders may only be granted upon a showing of probable cause that the target committed one of a list of serious crimes, now including terrorism and computer crimes (18 USCA 2516(1), 2000 & Supp. 2002). FISA wiretap orders are more likely to make their way to library networks, because the threshold to receive an order is slightly lower and because the Act allows roving surveillance authority (18 USCA 1805(a), 1805(c)(2)(B), 2000 & Supp. 2002). Roving wiretaps allow agents to target surveillance to an individual, rather than a particular device. Thus, as the individual moves from the phone in the coffee shop, to one in an office, to one in a library, the roving wiretap can follow (Rackow, 2002). Again, libraries may never become aware of these wiretaps since installation will be at the phone company or Internet service provider.

There are a number of other legal processes through which government authorities can gain access to information,

many of which predate the USA PATRIOT Act. Two excellent matrices, *Library Records Post-PATRIOT Act* (Minow, 2002) and *The Search & Seizure of Electronic Information: The Law Before and After the USA PATRIOT Act* (ALA, 2002), provide overviews of the type of information sought and the legal process required.

What to Do When They Knock on Your Door

All these new laws, so little time to comply. What should a library do when law enforcement stops by ready to take advantage of the surveillance provisions of the USA PATRIOT Act? In short: prepare, train and follow up.

You are not alone in this. The American Library Association provides guidelines to help librarians prepare for investigations: *Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff* (ALA, 2002) and *Guidelines for Librarians on the U.S.A. PATRIOT ACT: What to do before, during and after a "knock at the door"* (ALA, 2002). The ALA also provides suggested procedures for implementing policies, many of which are available online or in the *Intellectual Freedom Manual* (Office for Intellectual Freedom, 2002). Mary Minow provides a number of helpful ideas in her fine *Library Journal* article "The USA PATRIOT Act" (2002). In that same issue Karen Coyle explains what a privacy audit is and how librarians should go about conducting one. Many more resources on privacy are available at the ALA Office of Intellectual Freedom's *Privacy and Confidentiality* site at <http://www.ala.org/alaorg/oif/privacy.html>

The End of Patron Privacy?

Can it be that the USA PATRIOT Act marks the end of privacy in American libraries? I do not think so.

This faith is not based on any illusion that the federal authorities will refrain from abusing the broad powers handed them, though I continue to hope for such restraint. Nor does it rest on a belief that

Click here for more information:

ALA—USA PATRIOT

Act in the library:

<http://www.ala.org/alaorg/oif/usapatriotlibrary.html>

ALA—Libraries & the PATRIOT legislation:

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ALA—Privacy & confidentiality:

<http://www.ala.org/alaorg/oif/privacy.html>

ALA—Privacy resources for librarians & families:

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Center for Democracy & Technology—USA PATRIOT Act

Resources:

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%20Resources.pdf](http://www.law.arizona.edu/Library/internet/research_guides/USA%20PATRIOT%20ACT%20Resources.pdf)

the courts will strike down law enforcement actions that curtail civil liberties in libraries. Too often in our past serious intrusions on civil liberties have been overlooked in times of national emergency. And though the House of Representatives did include a sunset provision in the USA PATRIOT Act, so that various amendments such as section 215 will expire on December 31, 2005, neither do I rely on Congress alone to restore the balance between security and privacy.

In the end, it is my confidence in librarians and the ends to which they will go to protect civil liberties that gives me hope. They have long been in the vanguard of the fight for freedom. Through preparation, advocacy, agitation, and working together with others who appreciate the fragility of our liberties, librarians can prevail to protect personal privacy. 

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